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SUPERIOR COURT  
YAVAPAI COUNTY, ARIZONA  
2010 OCT 29 AM 10:42  
JEANNE LICKS, CLERK  
S. KELBAUGH  
BY: \_\_\_\_\_

IN THE SUPERIOR COURT OF STATE OF ARIZONA  
IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA,  
  
Plaintiff,  
  
v.  
  
STEVEN CARROLL DEMOCKER,  
  
Defendant.

Cause No. P1300CR20081339  
  
STATE'S REPLY TO ITS  
MOTION FOR WITNESS  
TO TESTIFY LIVE VIA  
VIDEO LINK  
  
Honorable Warren Darrow  
Division 6

The State of Arizona, by and through Sheila Sullivan Polk, Yavapai County Attorney, and her deputy undersigned, hereby replies to Defendant's Response in objection to the State's request for an Order allowing the State's expert witness Sy Ray appear at trial by a live appearance using the video link "SKYPE".

MEMORANDUM OF POINTS AND AUTHORITIES

RELEVANT FACTS:

The State incorporates by reference the facts as set forth in its original Motion. Specifically, the State notes:

1. Mr. Ray was disclosed on June 5, 2009

- 1 2. The defense conducted a recorded interview of Mr. Ray on April 23, 2010
- 2 3. Mr. Ray was served with a subpoena for trial on May 4, 2010
- 3 4. Mr. Ray was deployed to Afghanistan, without notice to the State, on July 22,
- 4 2010

5 5. Numerous attempts between Mr. Ray's superiors and the State to work out a safe  
6 and secure method of returning Mr. Ray to the United States to testify have been  
7 unsuccessful

8  
9 6. Mr. Ray's superiors have recently denied the State's request to return Mr. Ray to  
10 Arizona due to the sensitive and dangerous nature of his mission

11 7. The County Attorney's Office successfully completed a live video stream  
12 conference with Mr. Ray from Afghanistan. The electronic media connection was crisp and  
13 clear with no delay in voice transmission from either end. Mr. Ray will not present a Power  
14 Point in the traditional sense, but rather the photographs from the Power Point presentation  
15 will be put on the overhead projector to aid the jury with his testimony.

16  
17 **LEGAL ARGUMENT:**

18 Defendant ignores the State's argument that public policy dictates that Mr. Ray be  
19 allowed to testify via video conference through the SKYPE software application. Instead he  
20 hangs his hat on *United States v. Yates*, 438 F.3d 1307 (11th Cir. 2006) where the reviewing  
21 court found that the government had not provided adequate public policy considerations in  
22 determining that two civilian witnesses from Australia could testify via video conferencing.  
23 "Rather, the trial court allowed the two-way video testimony based only on the Government's  
24 assertions in its motion that the Australian witnesses were unwilling to travel to the United  
25 States for Trial, and the Government's posited 'important public polic[ies] of providing the  
26

1 fact-finder with crucial evidence,' 'expeditiously and justly resolving the case,' and 'ensuring  
2 that foreign witnesses can so testify.'" 438 F.3d at 1315-16 (internal record references  
3 omitted). As noted by Defendant in his Response, the *Yates* Court stated:

4       The district court made no case-specific findings of fact that would support a  
5 conclusion that this case is different from any other criminal prosecution in  
6 which the Government would **find it convenient** to present testimony by  
7 two-way video conference. ... If we were to approve introduction of  
8 testimony in this manner, **on this record**, every prosecutor wishing to  
9 present testimony from a witness overseas would argue that providing crucial  
prosecution evidence and resolving the case expeditiously are important  
public policies that support the admission of testimony by two-way video  
conference.

10 Response at p. 3, lines 7-15 (emphasis added).

11       This Court is fully aware that the situation in *Yates* is on the other side of the  
12 spectrum from the facts in this case. Due to circumstances beyond the State's and witness's  
13 control, the subpoenaed Mr. Ray was deployed to Afghanistan before his testimony could be  
14 secured. Diligent effort has been made to secure Mr. Ray's presence at trial, but due to the  
15 highly volatile nature of the war in Afghanistan, Mr. Ray is not allowed to leave his post  
16 there until 2011.

17       The State concedes that "*Craig* plainly requires a public interest more substantial than  
18 convicting someone of a criminal offense." *United States v. Abu Ali*, 528 F.3d 210 (4th Cir.  
19 2008). The *Abu Ali* court found that the government's interest in preventing terrorism was  
20 sufficient to keep a defendant charged with planning terrorist attack from traveling to Saudi  
21 Arabia to attend depositions<sup>1</sup> there. However, other courts have discussed the undeniable  
22

23  
24  
25 <sup>1</sup> Rule 15, Fed. R. Crim. P. provides that if a witness cannot be compelled to testify at trial, a  
26 pretrial deposition may be held. Courts have found no constitutional violation when a  
defendant participates in a Rule 15 deposition through a video link. *United States v.*  
*Medjuck*, 156 F.3d 916, 920 (9th Cir. 1998).

1 public policy concern set forth in *Abu Ali* and have held that "applying terrorism as a  
2 standard sets an exceptionally high threshold for an exception under *Craig*, one that would  
3 deny courts the flexibility to balance the issues presented by specific cases." *United States*  
4 *v. West*, 2010 WL 3324886 (N.D. Ill.) (Aug. 18, 2010).

5 The important public policy in this case is that "the State's expert witness is serving  
6 his country in a war half-way around the world. His efforts contribute to protecting  
7 American soldiers abroad and protecting the national security of this county. Due to the  
8 delicate nature of his work, Mr. Ray's life and the lives of American soldiers could be at risk  
9 if he was allowed to return to Arizona to testify in this trial." The State respectfully submits  
10 that these facts demonstrate the public policy consideration enunciated in *Craig*.

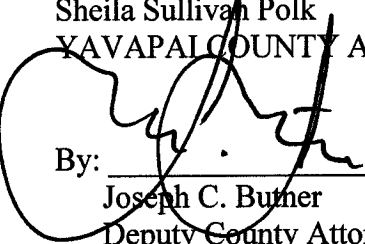
11 **CONCLUSION:**

12  
13  
14 Mr. Ray should be permitted to testify via live video stream from Afghanistan. The  
15 State has made diligent effort to secure Mr. Ray's presence at trial. The defendant's absolute  
16 right to a face-to-face confrontation before the trier of fact would be served. The trier of fact  
17 would be able to observe the combined effects of the witness' demeanor and confrontation.  
18 All questions and answers would be under the same conditions as live testimony. Mr. Ray  
19 would be placed under oath like any other witness. The Court would be able to rule instantly  
20 on the admissibility of testimony. All of the defendant's Sixth Amendment rights of cross-  
21 examination are satisfied.

22  
23 The State has demonstrated a compelling national security interest and sound public  
24 policy for need to allow Sy Ray to testify via live video stream in this case.  
25  
26

1 RESPECTFULLY SUBMITTED this 29<sup>th</sup> day of October, 2010.

2 Sheila Sullivan Polk  
3 YAVAPAI COUNTY ATTORNEY

4 By:   
5 Joseph C. Butner  
6 Deputy County Attorney

7 COPIES of the foregoing delivered this  
8 29<sup>th</sup> day of October, 2010, to:

9 Honorable Warren Darrow  
10 Division 6  
11 Yavapai County Superior Court  
12 (via email)

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By: Pat Kavanaugh

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